No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1944

WEBRE STEEL COMPANY, LTD., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

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OPINIONS BELOW

The findings of fact and memorandum opinion of the Processing Tax Board of Review (R. 30–42) are unreported. The opinion of the Circuit Court of Appeals (R. 73–77) is reported at 140 F. 2d 768.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944. (R. 78.) Petition for rehearing was denied March 13, 1944. (R. 84.) Petition for a writ of certiorari was

filed June 12, 1944, and was granted October 9, 1944. (R. 84.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Processing Tax Board of Review created by Title VII of the Revenue Act of 1936 erred in holding that the petitioner had borne the burden of the taxes paid by it in an amount which represented the extent of tax absorption indicated by the presumption established by Section 907 of the Act.

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix A, *infra*.

STATEMENT

This proceeding was instituted in the Processing Tax Board of Review[1] upon the disallowance by the Commissioner of Internal Revenue of the petitioner's claim filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes in the amount of $8,169.97, paid under provisions of the Agricultural Adjustment Act, as amended, which was declared unconstitutional in *United States* v. *Butler*, 297 U. S. 1.

[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

According to the findings of the Processing Tax Board of Review (R. 31–36), during the entire period here under consideration the petitioner was engaged in the operation of a sugarcane plantation, in purchasing sugarcane from others, and in processing cane into direct-consumption sugar and edible molasses. It was a processor of sugarcane within the meaning of the Agricultural Adjustment Act, as amended. (R. 31.)

The tax period in question began June 8, 1934, and ended November 8, 1935. During the harvest months of October, November and December, 1934, and October and November, 1935, the petitioner engaged in processing, filed processing tax returns, and paid processing taxes aggregating $8,168.74 plus interest of $1.23.[2] (R. 34.)

Universal increases in the sale price of sugar took place on the effective date of the processing tax, June 8, 1934, in approximately the amount of the tax. (R. 34.) All of the accounts stated between the petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses, included the processing tax as a separate item in addition to the sale price of the article; a typical account sale of petitioner's sugar through this broker also carried the tax as an "extra". (R. 35.) And a letter to the petitioner from the broker early in 1936 stated that the petitioner did not pay more

[2] The tax and interest on sugar amounted to $7,067.12 and on molasses to $1,102.85. (R. 32.)

tax upon 320,000 pounds of its sugar than was collected from buyers. (R. 36.) All sales were made in the open market, in competition with other sellers. (R. 32.) There was no agreement directly between petitioner and purchasers of its product relative to shifting the tax. (R. 36.)

The Board found that the petitioner's average margin for the tax period, computed as directed in Section 907 of Title VII, was $.01192 per pound of raw sugar processed. During the statutory "base period" before and after the tax, the average margin was $.01354. Hence the average margin was $.00162 lower during the tax period than during the base period. (R. 35.) Concluding that under Section 907 of the Act, the petitioner had borne the tax to the "presumed" extent indicated by this reduction in margin, the Board awarded a refund of $3,655.82, arriving at this result by multiplying the difference in margins by the number of units processed. (R. 35, 36.)

The Circuit Court of Appeals concluded (R. 77) that the findings with respect to other facts fully rebutted the presumption arising from the difference between average margins and that, since there was no other proof to support any refund, the decision of the Board must be reversed.[1]

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[1] The opinion (R. 77) and the judgment (R. 78) of the Circuit Court of Appeals both state that "the decision is reversed and the cause remanded to the Tax Court for further proceedings not inconsistent with" the Court's opinion. The order of remand, however, expressly states (R. 77) that

SUMMARY OF ARGUMENT

Title VII of the Revenue Act of 1936 provided for the refund of processing taxes paid pursuant to the invalidated Agricultural Adjustment Act. Recovery was expressly conditioned upon proof that the claimant bore the ultimate economic brunt of the tax. However, as an aid to establishing whether the tax burden had been assumed or whether the claimant had shifted it to others, Congress created a "two-way" presumption based on a comparison of the claimant's margin, as defined, during the tax period, with his margin during a prescribed base period. If the margin remained constant or if it was greater in the tax period than in the base period, the tax was presumed to have been shifted; if the margin was less, the tax was presumed to have been absorbed to the extent of the reduction. Provision was made for either party to rebut the presumption by proof of the "actual extent" to which the claimant passed on to others the burden of the tax, and examples of pertinent rebuttal evidence were set forth. These examples, however, were expressly made non-exclusive of other proof.

"the claim [of the petitioner] should have been disallowed in its entirety" and no instruction is given to the Tax Court as to what further proceedings it shall take upon the remand. We shall assume in this brief that the court below intended that the Tax Court should deny the claim without further hearing or consideration.

In the case at bar, the margin comparisons indicated that the petitioner had to some extent assumed the tax burden. But the Commissioner, following exactly the suggestions for rebuttal proof made in the statute, produced evidence which clearly showed that the claimant had in fact shifted the entire burden of the tax to its customers. Nevertheless, the Board of Review gave judgment for the petitioner based upon the presumptive absorption shown by the margin calculation; its decision was reversed by the court below and the claim denied, on the ground that the presumption disappeared from the case upon the introduction of the Commissioner's evidence, leaving nothing upon which to found a judgment favorable to the petitioner. We submit that this was the correct disposition of the case.

Under the statute, the petitioner had the burden throughout the Board proceedings of proving that it bore the ultimate brunt of the tax. That burden was not affected by the presumption of partial absorption arising from the margin comparisons. Congress expressly made the presumption rebuttable, and it is never the function of a disputable presumption to shift the burden of proof. It is neither evidence nor to be treated as such. This kind of presumption serves merely to require that upon proof of a given basic fact, the trier of fact shall infer the existence of the presumed fact unless and until the opposing party produces sufficient

evidence to justify a finding that the presumed fact does not exist. When such evidence has been introduced, the presumption is eliminated from the case, and the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action. These principles have long been the view of this Court.

It is true that the statute here provides that the presumption may be rebutted by proof of the "actual extent" to which the tax was passed on. But further provisions of the statute definitely demonstrate that Congress did not intend by those words to import any different requirement with respect to the kind or degree of proof necessary to rebut the presumption from that which governs the refutation of disputable presumptions under well understood principles of evidence. This Court early said that the "actual" extent of shift was specified merely in contradistinction to the "presumed" extent of shift.

We grant that, although there is no conflict of decisions, the Circuit Court of Appeals for the Second Circuit entertains a different view of the effect of the statutory presumption from that held by the court below. But we think that in casting upon the claimant as a result of the presumption a burden greater than the burden of proof in the case, the court there neglected to consider that this is a presumption which

may operate against either party; that there is no warrant in the statute for applying it in one manner as to the taxpayer and in another as to the Government; and that if the court's rationale were applied to the presumption when it was unfavorable to the Government, the burden upon the Government would be greater than if it had the affirmative of the issue, even though the Government has no case to prove.

With the presumption out of the case, we submit that there was no rational basis in the evidence here for any conclusion other than that the petitioner had shifted the tax. We agree that the margin evidence upon which the presumption was based remained in the case. But we contend that the probative value of the margin evidence to establish tax absorption was negligible—certainly it was grossly insufficient in the face of the evidence introduced by the Commissioner to carry the petitioner's affirmative burden of establishing that it had not in fact shifted the tax. And the petitioner produced no other competent evidence in support of its claim.

There is no merit to the petitioner's contention that it was entitled to a refund of the total tax paid on the basis of a comparison of its margin for the tax period with its margin for a base period other than that which the statute prescribes, on the ground that a portion of the

statutory base period is inapplicable because the petitioner sold none of its product during that portion and that the remainder of the period is inappropriate because of factors rendering it an inequitable period for comparison. The language used by Congress in establishing the comparison formula prescribes what the base period shall be. There is no warrant for the substitution of any other period.

Should the Court be of the view that the comparative margin evidence has greater probative value than is contended above and that the court below should not have directed the Tax Court to dismiss the claim, we submit that the proceeding should be remanded to that Court with directions to reconsider the evidence and reach a conclusion freed of the error resulting from the Processing Tax Board's attachment of weight to the statutory presumption after counter-evidence had been introduced.

ARGUMENT

THE BOARD OF REVIEW ERRED IN HOLDING THAT THE PETITIONER BORE THE BURDEN OF THE PROCESSING TAX IN ANY AMOUNT

Section 902 of the Revenue Act of 1936 (Appendix A, *infra*) requires a claimant for the refund of processing taxes paid under the Agricultural Adjustment Act to establish that he bore the ultimate burden of the tax. The section is both specific and all inclusive in this respect; re-

covery is expressly conditioned on proof by the taxpayer:

> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, * * *, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; * * *

The intent of Congress is clear from the Report of the Senate Committee on Finance on the Revenue Act of 1936 (S. Rep. No. 2156, Appendix B, *infra*) which states (p. 33):

> Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden.

The Committee recognized, however, that "the question as to whether processing taxes were

passed on * * * involves extremely complicated economic and accounting considerations". And since at the time the processing tax was levied no reason existed for believing that the recording of the pertinent information would be of future benefit, it was manifest to the Congress that in many instances considerable difficulty would be encountered in proving directly either that the tax was borne or that it was shifted.

Accordingly, Section 907 (a) of the Act (Appendix A, *infra*) provides that the claimant may establish a "*prima facie*" case for absorption by showing the extent by which his average margin between gross sales prices of the commodity and its cost plus the taxes paid, was less during the tax period than the average margin between sales price and cost in the two years preceding payment of the taxes and the six months succeeding invalidation of the tax by this Court in January of 1936. If the average margin during the tax period was equal to, or greater than, the margin in the period before and after the tax, the statute makes that fact "*prima facie* evidence" that none of the burden was borne by the claimant. Subsection (e) of Section 907 (Appendix A, *infra*) declares, however, that either the claimant or the Commissioner may rebut the "presumption" established by the margin comparisons by proof of the "actual extent to which the claimant shifted to others the burden of the processing tax".

In the case at bar, the Board of Review found (R. 35) that the average margin per unit of the sugar processed was $.00162 lower in the tax period than in the base period. Under subsection (a) of Section 907, therefore, the petitioner established a *prima facie* case that it had absorbed the tax to the extent of the reduction in margin. Pursuant to subsection (e) of Section 907, however, the Commissioner then introduced substantial evidence, hereinafter considered in detail, to show that the petitioner had in fact shifted the burden of the tax to others; that evidence stood uncontradicted and was specifically accepted in the fact findings as true. (R. 34–36.) Nevertheless, the Board decided on the basis of the presumption that the petitioner was entitled to a refund to the extent that the margin computations showed a reduced margin in the tax period. The Circuit Court of Appeals, following the analysis which it made of the presumption in the case of *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853, reversed the decision, holding (R. 77) that the claim should have been disallowed in its entirety. The Government maintains that this was the correct disposition of the case.

A. THE PRESUMPTION OF PARTIAL ABSORPTION BASED UPON THE MARGINAL COMPARISONS DISAPPEARED FROM THE CASE UPON INTRODUCTION OF THE COMMISSIONER'S REBUTTING EVIDENCE

In any action for refund of taxes the claimant has the general burden of proving that the Government withholds money which in equity should

be returned. *Helvering* v. *Taylor*, 293 U. S. 507. And as previously noted, under Section 902 of the Act with which we now deal, a claimant for the refund of processing taxes has the specific burden of proving, as an express condition to recovery, that he bore the ultimate economic brunt of the tax. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. Cf. *United States v. Jefferson Electric Co.*, 291 U. S. 386. The petitioner at bar was therefore possessed of a particularly onerous burden of proof, and that burden remained with it from the outset of the Board proceedings to their close. For the burden of proof, being a matter of substantive law, rests always with the party upon whom it was originally placed; it never shifts with the evidence. *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104; *Hill* v. *Smith*, 260 U. S. 592; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367; *Central Vermont Ry.* v. *White*, 238 U. S. 507.

The presumption created by Congress in Section 907 of Title VII did not declare any rule of substantive law.[1] Being expressly made rebut-

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[1] Cf. Section 115 (b) of the Internal Revenue Code which declares that every distribution to stockholders is a dividend to the extent of earnings available. This is a so-called "conclusive" presumption; it *does* state a rule of substantive law. See *Edwards* v. *Douglas*, 269 U. S. 204; *Christopher* v. *Burnet*, 55 F. 2d 527 (App. D. C.); *Leland* v. *Commissioner*, 50 F. 2d 523 (C. C. A. 1st); *McCaughn* v. *McCahan*, 39 F. 2d 3 (C. C. A. 3d).

And cf. *Heiner* v. *Donnan*, 285 U. S. 312, dealing also with a "conclusive" presumption.

table, it merely stated a rule of evidence not designed in any way to affect the burden of proof resting on the processing tax claimant under Section 902 of the Act. It is never the function of a disputable presumption to shift the burden of persuasion; such a presumption serves merely to require that on proof of a certain basic fact the trier of fact shall infer the existence of the presumed fact unless the opposing party produces sufficient evidence to render the non-existence of the presumed fact as probable as its existence. When once such evidence has been introduced the presumption disappears, and the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action. *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104, 110; *N. Y. Life Ins. Co.* v. *Gamer*, 303 U. S. 161, 170–172; *Del Vecchio* v. *Bowers*, 296 U. S. 280; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639; *Hill* v. *Smith*, 260 U. S. 592; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367; *Mobile, J. & K. C. R. R. Co.* v. *Turnipseed*, 219 U. S. 35; IX Wigmore, Evidence (3d ed.), Secs. 2489, 2491; American Law Institute, Model Code of Evidence, 306–318.

The rules governing disputable presumptions are fully discussed by this Court in *Commercial Corp.* v. *N. Y. Barge Corp.*, *supra*, which involved the presumption that where goods are lost in the possession of a bailee, he is at fault. In that case

the evidence by both parties left the cause of the loss in doubt. Holding that in such circumstances the bailor could not recover, the Court said (pp. 110–111):

> The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. * * * Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was not one involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. * * * If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. * * *
>
> Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which

> the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start.

In *Del Vecchio* v. *Bowers*, 296 U. S. 280, *supra*, this Court dealt with the Longshoremen's & Harbor Workers' Compensation Act, Section 20 of which provides that in any proceeding to enforce a claim for compensation under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary— * * * (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself * * *" The Court there said (p. 286):

> Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

There is no reason to infer that Congress intended by Section 907 to erect a presumption having any different character from that consonant with these principles. It is true that Section 907 (e) states that either party may rebut the presumption by proof of the "actual extent" to which the claimant passed on the tax. This does not mean however that refutation must demon-

strate with mathematical exactitude the extent to which the tax burden was shifted; the petitioner itself negatives (Br. 21–22) any such literal intendment. And we submit that the further provisions of Section 907 (e) distinctly show that Congress did not intend the words "actual extent" to import any different requirement whatever with respect to the kind or degree of proof necessary to rebut the presumption from that which governs the overthrow of rebuttable presumptions under the well-understood rules of evidence above discussed. Immediately following the declaration in Section 907 (e) that the presumption may be rebutted by proof of the "actual extent" to which the claimant shifted the burden, Congress set forth various kinds of evidence which it deemed pertinent to rebut the presumption. But Congress was careful to precede the list with the express statement that "Such proof may include, but shall not be limited to" the examples of evidence stated in the statute. So obvious an effort to avoid the rule *expressio unius est exclusio alterius* serves plainly to show, we think, that Congress had in mind merely to create an ordinary disputable presumption which would be dispelled by any competent evidence, either direct or circumstantial, sufficient to raise doubts as to the validity of the inference arising preliminarily from the margin comparisons.

This view was taken in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. There the taxpayer, in an early attack upon the constitutionality of Title VII, contended *inter alia* that to require proof of the "actual extent" of tax shift might operate as a denial of the claimant's constitutional rights, because such a requirement was inherently impossible of fulfillment. This Court declared however (p. 355) that the "words *actual* extent" in subsection (e) of Section 907 "are used in contradistinction to the *presumed* extent". In other words, "actual" means "in actuality" rather than "precise" or "unquestionable", and the use of the term does not signify that the presumption may be overcome only by the strongest and most accurate proof. Elsewhere in the section—in the use of the term "*prima facie* evidence", in the care with which Congress provided a wide-open door to the presentation of all varieties of evidence appropriate to rebut the presumption—the petitioner's contention that the words "actual extent" are words of limitation, which constitutes the premise of its whole case, is negatived.

It is true that in the case of *E. Regensburg & Sons* v. *Helvering*, 130 F. 2d 507, the Circuit Court of Appeals for the Second Circuit attributed to the statutory presumption a greater force and effect than we here contend that it has. However, the actual decision in that case presents no conflict with the decision in this one. Both courts

reversed the Board for basing its determination upon the statutory presumption without evaluating the disfavored party's rebuttal evidence. Furthermore, since it was the taxpayer against whom the presumption operated in the *Regensburg* case, the court was not called upon there to consider the effect of the presumption when, as here, it is the Commissioner whose evidence in rebuttal is under appraisal; hence the case is not contrary authority in point. Nevertheless, the court in the *Regensburg* case used such terms as to leave little doubt that its views as to the character of the presumption are not in accord with those which are held by the court below.[5]

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[5] Nor do they agree with the views of the Circuit Court of Appeals for the Sixth Circuit. In *Cornett-Lewis Coal Co.* v. *Commissioner*, 141 F. 2d 1000, the court was concerned with Title III of the Revenue Act of 1936, the unjust enrichment tax law, which is a companion statute to the one with which we here deal. Title III also created a "two-way" presumption with respect to tax incidence, based on margin computations, and provided for its rebuttal "by proof of the actual extent to which the taxpayer shifted to others the burden of the * * * tax." Revenue Act of 1936, Section 501. The Sixth Circuit in the *Cornett-Lewis* case criticized (p. 1005) the view of the presumption adopted in the *Regensburg* opinion and followed instead the view which is taken here. See also *Clinchmore Coal Mining Co.* v. *Commissioner*, 143 F. 2d 112 (C. C. A. 6th); *Harlan Collieries Co.* v. *Commissioner*, 142 F. 2d 453 (C. C. A. 6th).

And compare, as in substantial harmony with the Fifth Circuit's analysis of the Section 907 presumption, the dissenting opinion of Edgerton J., in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713, 717 (App. D. C.).

The court reasoned in the *Regensburg* case (p. 508) that Section 907 neither imposed the burden of proof upon the claimant nor established merely an ordinary presumption against him when the prima facie margin evidence was adverse to his claim, since he already had the burden of proof, to which an adverse presumption would add nothing. Therefore (pp. 508–509),

> the section could not have used presumption in the strict sense, but that it meant that when the spread between "margins" is against the claimant, even though he may in general have otherwise satisfied the conditions of § 902 * * *, he must show that the spread was not owing to his shifting the tax.

In other words, the taxpayer's rebuttal burden under Section 907 was regarded as greater, or at least as more specific in character, than the burden under Section 902 of proving his case. This is, of course, directly contrary to the usual interplay between rebuttable presumption and burden of proof.

The court ignored the fact that Section 907 creates a presumption which may operate either in favor of the taxpayer or of the Government and is, therefore, a "two way" presumption. It is not true, moreover, that no presumption is ever recognized as against one who has the burden of proof, for there are many instances in which a presumption operates against

the party who has the affirmative of the issue. For example, in a jurisdiction which places the burden on the defendant to prove contributory negligence, he may be faced also with the presumption that the deceased, the fault for whose death is at issue, was exercising due care at the time of the accident. The case of *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d) dealt with a presumption under the estate tax law[6] that certain transfers of property when made within two years of death, "shall, unless shown to the contrary, be deemed to have been made in contemplation of death." Like the *Regensburg* case, the *First Trust* case was an action for refund—hence the taxpayer already had the burden of proof on the issue of whether death was contemplated. The court was not disturbed, however, by the lack of logic in a presumption added to the burden of proof upon the claimant. The executors failed in the *First Trust* case not by reason of any extraordinary force in the presumption, but by reason of having the burden of proof. The trial court's view that the presumption continued operative after the executors had gone forward with rebuttal evidence[7] was rejected, although the statute provided that the presumed fact was to be accepted unless "shown to

[6] Internal Revenue Code, Section 811 (c).

[7] Cf. *Mather* v. *MacLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Myers* v. *Magruder*, 15 F. Supp. 488 (D. Md.); *Liebmann* v. *Hassett*, 50 F. Supp. 537 (D. Mass.).

the contrary".[5] Speaking through Judge Learned Hand, the court characterized the situation created by the coincidence of presumption and burden as follows (p. 941):

> To make good * * * [their] claim they [the executors] must not only bring forward some evidence that Ballard did not make the gift in contemplation of death, but they must carry the burden of proof on that issue; a duty which comprises more than the duty imposed by the presumption.

The same reasoning is entirely applicable to a processing tax case in which the margin presumption operates adversely to the claimant. It follows that since the presumption here operates in the same manner as to either party, the Government's duty under Section 907 is not greater than when the presumption favors the taxpayer. It must cast doubt on the validity of the inference, but manifestly need not carry the burden of proof under Section 902, which "comprises more than the duty imposed by the presumption." Conversely the claimant may overcome a pre-

[5] Cf. *Del Vecchio* v. *Bowers*, 296 U. S. 280, *supra*, where the statutory presumption was to govern "in the absence of substantial evidence to the contrary." This Court, treating the presumption as dissipated by evidence sufficient to justify a finding that the presumed fact did not exist, said in effect (p. 286) that the requirement that evidence to overcome the presumption must be substantial added nothing to the general evidentiary principles governing the refutation of disputable presumptions.

sumption adverse to him by introducing evidence inconsistent with it, even though it falls short of proving his case. See *Anniston Mfg. Co.* v. *Davis, supra.* However, in order to prove his case where, for example, the margin computations show that the tax was entirely shifted, it may be necessary on occasion for the taxpayer to account specifically for the unfavorable spread.

If it were true that the comparative-margin presumption went beyond the burden of proof in some respect, the anomalous consequence would be, in a case in which the presumption favored the taxpayer, that the Government, which had no case to prove, would nevertheless be under a greater burden than the moving party in the action. No reason exists for supposing that Congress intended thus to reverse the usual situation in refund actions. It sought, rather, to supply a substitute for proof where proof was not available and to provide a point of departure for consideration of the evidence if additional proof was forthcoming; and we submit that this is all that it did.

The evidence which the Commissioner produced in rebuttal of the margin computations in the instant case must be judged in the light of Section 907 (c) (2) of the Act, which sets forth various types of proof to rebut a presumption favorable to the claimant, based upon the margin evidence. As "proof that the claimant * * * changed

the sale price of the article • • • by substantially the amount of the tax", the Commissioner produced evidence which the Board accepted as true (R. 34), that universal increases in the sale price of sugar were made by the industry on the effective date of the processing tax in precisely the amount of the levy. The petitioner continues to emphasize (Br. 37–39) that it did not increase its price on the imposition date because it was not processing sugar at that time and did not begin to process or sell until four and one-half months later. The Board concluded that petitioner joined in the general price increase when it re-entered the market, stating (R. 41) that the reasonable inference to be drawn was that the petitioner, operating competitively (R. 32), did join in the increase and "at least, for a time, was able to, and in fact did, shift the burden of the processing tax to the consumer."[9]

The Commissioner also adduced evidence, which was accepted as true by the Board (R. 35), that all sales of molasses made through the petitioner's

[9] It is urged (Br. 39–41), that the universal price increase in the sugar industry was not "tax covering" but was due to a factor other than the tax, i. e., the quota system of control which became effective by statute coincidentally with the imposition of the processing tax. The petitioner claims (Br. 40) that the price movement was controlled by the quota and that that factor "dominated all other factors." However, if the quota and not the tax was responsible for the price rise, it is remarkable that the amount of the increase tallied exactly with the amount of the tax. The inference to be drawn from the fact of the increase was, in any event, a matter for the Board.

broker, E. A. Rainold, Inc., included the processing tax as a separate item and as an addition to the sales price.[10] The Commissioner also offered an account stated on the sale of petitioner's sugar, which the Board found to be typical of all accounts respecting sugar sales made through E. A. Rainold, Inc., and which bore the following notation (R. 35):

> Golden Ridge 100 Pkts 10,000# @3.71c $371.00
> F. O. B. Phtn. Tax Pd.
> Tax 0.526c[11]

A letter to the petitioner from its broker, dated shortly after the processing tax was declared unconstitutional and introduced in evidence by the Commissioner, showed (R. 35–36) that the broker had collected on behalf of petitioner the processing tax on 320,000 pounds of sugar, which more than reimbursed petitioner for all the processing taxes paid by it on sugar processed from the 1935 crop (R. 13). The letter related only to the 1935 processing, but presumably the 1934 processing was handled in the same way, since it was preceded by the price increase and the product was sold with the tax billed as shown above.

Thus in the manner expressly contemplated in the statute, the presumption was attacked and the reliability of the margin computation as evidence

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[10] All sales of the petitioner's products after the early part of 1932 were made through brokers in the open market in competition with other manufacturers. (R. 32.)

[11] The figure 0.526 was the prevailing rate of the processing tax at or about the time of rendition of this account. (R. 35.)

of tax absorption was impugned. The Commissioner's evidence was ample to "raise doubts as to the validity of the inference"[12] of absorption, or to "justify a finding"[13] of shift. It was, indeed, far more compelling. It plainly showed a general practice on the part of petitioner to pass on the processing tax throughout the period in which it was subject to the levy.[14] We submit that the presumption of partial absorption arising here from the margin comparisons was fully rebutted;[15] it was therefore at that stage of the proceedings completely eliminated from the case.

B. THE PROCESSING TAX BOARD ERRED AS A MATTER OF LAW IN RENDERING A DECISION WHICH (1) GIVES CONTINUED EFFECT TO THE PRESUMPTION AND (2) DOES NOT REST UPON SUBSTANTIAL EVIDENCE. THE COURT BELOW PROPERLY DIRECTED THAT PETITIONER'S CLAIM BE DISALLOWED

Contrary to the view just advanced, the Processing Tax Board of Review continued to treat

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[12] *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104, *supra*.

[13] *Del Vecchio* v. *Bowers*, 296 U. S. 280, *supra*.

[14] If petitioner's acts, disclosed by the Commissioner's rebuttal evidence, did not "represent his practice at other times" it was his right under Section 907 (e) to come forward with evidence to that effect. He offered no such evidence.

[15] Cf. *United States* v. *H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 932, 935 (C. C. A. 8th). There the court regarded the fact that the processor, immediately after the imposition of the tax, increased prices in the amount of the tax as a "concrete definitely controlling consideration" and concluded that from this showing alone the taxpayer had "manifestly shifted the burden to the customers."

the comparative-margin presumption as operative and ultimately based its decision of partial award thereon. The case is not one in which the Board, applying the correct rules of law with respect to the character and effect of the statutory presumption, weighed the evidence in rebuttal and found it inadequate to overcome the presumption. Even if it were, we believe that, in view of the weight of the Commissioner's evidence, such a conclusion could not have been sustained.[16] But the Board continued the presumption to the end of the case; its ultimate finding (R. 36) that the petitioner had not shifted the tax to the extent of the $3,655.82 awarded was simply an application of the margin computation.[17] We think it is clear that the Board gave artificial weight to the presumption and thus committed an error of law. For while it is true that whether the claimant bore the economic burden of the tax is an issue ultimately factual in character (*Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.)), the play of the presumption in the case is a legal question (*Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5th); *E. Reg-*

[16] See Edgerton, J., dissenting in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713, 719.

[17] The opinion of the court below states (R. 74):

> The refund entered by the Board was awarded upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax to the extent of $3,655.82.

ensburg & Sons v. *Helvering*, 130 F. 2d 507 (C. C. A. 2d)). And a determination by the trier of fact that the claimant did or did not bear the burden of the tax, brought about by an erroneous concept of the legal effect of the presumption, is not a sustainable decision. For that reason, the Board's decision was not sustainable in the instant case, under principles stated in *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

A more serious error was committed, we believe, in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.), in which the majority of the court, as one ground for affirmance, accorded finality to a similar determination by the Board, thus ignoring the fact that the issue before it, though ultimately factual, involved a "clear cut" question of law. Implicit in the court's view, if not clearly expressed in its opinion, was the concept that the presumption was "evidence" to which such weight attached as virtually to shift the burden of proof upon the Commissioner. The error of this concept and the error in result are so well stated in Justice Edgerton's dissenting opinion as to warrant quotation here *in extenso*. He said (p. 719):

> The opinion of the court, like that of the Board, rests on the premise that since the "prima facie evidence" or "presumption" was favorable to claimant, claimant was not required to prove that it bore the burden

of the tax but the Commissioner was required to prove the contrary; in other words, when claimant established its prima facie case the burden of proof shifted from the claimant to the Commissioner. This premise seems to me erroneous. I cannot reconcile it either with the settled meanings of the terms "prima facie evidence" and "presumption" or with the basic enactment in the second section of the statute that "No refund shall be made or allowed * * * unless the claimant establishes * * * that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden * * *." The rebuttal section, 907 (e), on which the court appears to rely, does not purport to limit that enactment. It purports, on the contrary, to limit the effect of the presumption. It is a legislative recognition of the fact that the particular types of evidence which it enumerates are, and others may be, "appropriate to overcome" the presumption. I think the spirit and purpose as well as the letter of the Act are violated by holding, as the court does, that a claimant who (1) immediately increases all his prices by the amount of the tax when it takes effect, (2) contracts with some of his vendees that he will refund to them the amount of the tax if the government refunds it to him, and (3) constantly recognizes, in other contracts and other writings, that he bears no part of the bur-

den of the tax, should still be presumed to have borne a part of that burden.

Because it continued the presumption in the face of weighty counter evidence, the Processing Tax Board in the present case necessarily failed to recognize that, with the presumption as such out of the case, the petitioner, who had the substantive burden of proving tax shift, had failed to sustain that burden. For, with the Commissioner's evidence in the case, there was nothing on the petitioner's side which would balance it—much less outweigh it as was necessary if petitioner were to sustain its burden of proof under Section 902. Hence the Circuit Court of Appeals was correct in determining that the claim should have been denied in its entirety, for there was no substantial evidence to support it.

The error thus committed was subject to judicial correction; for "when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence * * *. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings". *Commissioner of Internal Revenue* v. *Scottish American Inv. Co.*, Nos. 52–54, 220–222, this Term, p. 4 of slip sheet.

The petitioner argues (Br., Part III), as an alternative to contending that the presumption was evidence or that it cast upon the Commissioner the burden of proving tax shift, that assuming the presumption to have disappeared from the case as a compelled inference, the Board should nevertheless have been sustained because the lower tax-period margin, upon which the presumption rested, still remained as evidence of tax absorption. It is true that the margin evidence remained in the case after the presumption was dissipated; for the authorities agree that the evidentiary core of a rebuttable presumption continues after the compelled inference has disappeared. The core of the presumption joins the rest of the proof. American Law Institute, *Model Code of Evidence*, p. 309; *Franklin Peanut Co.* v. *Commissioner*, 144 F. 2d 979 (C. C. A. 4th). Here there was no other evidence on behalf of the petitioner for the factual basis of the presumption to join; the margin differential stood alone.[18] Its value as evidence of tax absorption was to be judged solely by its probative force without added weight by reason of its former force as the basis of a presumption. See Edgerton, J., dis-

[18] The so-called "rebuttal" evidence which the petitioner adduced to support the claim that it was entitled to refund of the total tax paid will be considered in Part "C" of this brief.

senting in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713, 719 (App. D. C.).

We submit that the comparative margin evidence was of so little evidentiary value that the Board could not rationally have founded a decision favorable to the petitioner upon it. The value of a tax-period reduction in margin as evidence that the claimant absorbed the tax to the extent of the reduction is intrinsically too slight to support a conclusion of absorption in the face of substantial counter evidence. The petitioner argues to the contrary; it urges (Br., Part III) that if the rational connection between the basic fact and the presumed fact were so slight, the presumption would be subject to objection as between private parties upon constitutional grounds. *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639. Cf. *Mobile, J. & K. C. R. R. Co.* v. *Turnipseed*, 219 U. S. 35. There is no constitutional issue here, but the argument seems to be that the legislative reliance upon a comparison of margins to found a presumption lends added weight to the result of the comparison as evidence. This, however, is but to repeat the Board's error in a different form.

Moreover, when the constitutionality of the statutory presumption was being considered in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, this Court did not indicate that it believed the rational

connection between basic and presumed fact to be close. In sustaining the statute, the Court merely stated (p. 354):

> But it cannot be said that the comparisons set up between the results of operations during the "tax period" and the "period before and after the tax" are *wholly irrelevant*.—[Italics supplied.]

We think that these words evidence the Court's view that the rational connection between basic fact and presumed fact was only sufficient to escape condemnation under the Constitution. But certainly this language lends no support whatever to the proposition that when the compelled inference has been dissipated, the margin differential will still constitute substantial evidence as a permissible inference of the ultimate fact, in the face of substantial countervailing proof.

A difference in the margin between the sales price of the processed commodity and the unit cost of the raw product plus the tax during the tax period and the margin during the base period would be but a slight indication of whether the claimant bore the burden of the tax, even if there were no opposing evidence. These margins take no account of the innumerable other factors affecting the selling price of commodities, such as labor costs, commissions, and cost of supplies. It is clear, for example, that a greater gross margin between the sales price of the finished product

and the cost of the raw product plus taxes may be due not to shifting the tax but to passing on to purchasers the increased cost of the taxpayer's business. The statute itself recognizes this in expressly providing that a claimant may rebut the presumption by proof that the margin change was due to factors other than the tax. Section 907 (e) (1), Appendix, *infra*. It is equally true that despite a smaller margin per unit between the sales price per unit of the processed commodity and the cost of the raw product plus processing taxes in the tax period, the decrease in the margin may not be due to the absorption of the tax by the processor. The taxpayer may still have passed the tax on to its customers. Any number of factors, or combinations of factors, may account for the margin differential. About all that can be said for the "rational connection" between the margin computation results and tax shift is that a business man normally passes on every item of expense that he can; that excise taxes of this character are usually reducible to a unit basis; and that if a taxpayer's profit remains constant under an increased tax burden, it may be supposed in the absence of contrary evidence that he has succeeded in shifting this item along with the rest. And conversely, operation at a lower profit has some tendency to show in the absence of contrary evidence that he has not succeeded, wholly or in part, in passing on the tax.

The dubious intrinsic quality of margin evidence *per se* is, we think, clearly disclosed by the Commissioner's proof in the case at bar. The following factors were shown:

(1) The universal imposition-date increase in sugar sales prices in precisely the amount of the tax.

(2) The typical account sale of petitioner's sugar which carried the tax as an "extra."

(3) The evidence that all molasses sales included the processing tax separately.

(4) The fact that petitioner's broker had collected the tax for its account on all of the 1935 sugar processing.

Any one of these items standing alone would have sufficed, we believe, to offset the marginal comparisons as evidence of tax absorption. Their combined weight did so to such an extent as to make it manifest that the Board could not rationally have founded a judgment for the petitioner upon the differential. The margin comparisons, in our judgment, were definitely not substantial evidence, and that evidence was overwhelmed by the Commissioner's proof. Cf. *Williams* v. *United States*, 48 F. Supp. 647 (C. Cls.), certiorari denied, 320 U. S. 750. The fact that the petitioner shifted the entire burden of the processing tax was established to so high a degree of probability that there was no rational basis for any other conclusion. Hence there was no occasion for remanding

the case to the Tax Court for further consideration there. See Edgerton, J., dissenting in *Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.). Cf. *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5th); *E. Regensburg & Sons* v. *Commissioner*, 130 F. 2d 507, 139 F. 2d 883 (C. C. A. 2d). The Circuit Court of Appeals properly directed that petitioner's claim be disallowed. See *Commissioner of Internal Revenue* v. *Scottish American Inv. Co., supra.*

If, contrary to our contention, this Court should conclude that the comparative margin evidence has greater probative value than we contend here, we submit that the decision of the Processing Tax Board should not be reinstated, but the case should be remanded to the Tax Court for consideration freed from the Board's error of attaching continued weight to the statutory presumption.

C. PETITIONER MAY NOT SUBSTITUTE MARGIN EVIDENCE FOR A DIFFERENT PERIOD IN PLACE OF THAT COVERING THE STATUTORY BASE PERIOD, AS A FOUNDATION FOR A PRESUMPTION THAT THE TAX WAS SHIFTED IN ITS ENTIRETY

The petitioner defends the Board's partial award and therefore to the extent of that award the margin computations upon which it was based. It claims, however, that the award was a minimum one and that recovery of the total tax paid should have been awarded. It attempts to impugn the statutory margin comparison by what it terms

"rebuttal" evidence, devoting much of its brief herein to a discussion of that evidence. The gist of petitioner's argument on this phase of the case is that the base period prescribed in the statute (Section 907 (c), Appendix A, *infra*), i. e., the twenty-four months preceding imposition of the tax and the six months succeeding its invalidation,[19] does not in this case afford a fair basis for comparison with the tax period. The petitioner did no processing in the six months following invalidation of the tax; and it claims that in the two-year period before the tax became effective there were many factors affecting its margin which if taken into account would demonstrate the unreliability of comparing that period with the tax period. It therefore proposes to substitute the period of its 1936 processing, beginning four months after the statutory period, for comparison with the tax period, upon the ground that the principal factors affecting its margin during that period, other than the tax, were the same as those in the tax period.

Concerning the sugar industry during the post-tax period, including the months sought to be employed by petitioner, the 1937 Report of the Secretary of Agriculture states as follows (p. 62):

> The invalidation of the processing tax and production-adjustment provisions of the

[19] The succeeding period is February to July, 1936, inclusive. The date of the *Butler* decision was January 6, 1936.

> program resulted in an inequitable redistribution of income under the quota system. The retail price showed only a small decrease in 1936; the price averaged 5.6 per pound; but there was a loss to growers, laborers, and taxpayers, and a corresponding gain to domestic sugar processors and foreign sugar producers.

Thus, since the sales price of the sugar remained approximately the same for the 1936 crop, and since there was no processing tax to pay on this crop, the processor enjoyed a considerably larger margin of profit. If this increased margin could be used as a basis of comparison excluding all or part of the pre-tax statutory period, the margin during the tax period would appear in a much more adverse light, and a presumption based upon the comparison would indicate that the entire tax burden had been assumed.

This contention, although claimed to be in "rebuttal" of the presumption, seeks really (R. 30) to establish a more favorable presumption.[20] But, as we have shown, a presumption based on margin comparisons in this case would lose its effective-

[20] If margin evidence relating to the 1936 crop period were offered simply as evidence with respect to the ultimate question of the extent to which the tax was absorbed during the tax period, it might be pertinent and entitled to consideration, although not as the foundation of a presumption. As evidence, however, it would be far weaker than the statutory margin evidence, particularly in the face of that offered by the Commissioner in this case.

ness because of the Commissioner's evidence. It would be of no consequence that the presumed extent of the burden borne by the taxpayer was 100 per cent rather than 50 per cent if, "in contradistinction to the presumed extent", evidence is introduced, "appropriate to overcome any presumption". *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355, 356. Petitioner's argument, therefore, would not advance his case.

In the next place, as both the Board and the court below held, petitioner is precluded from going outside the base period fixed by Congress in order to establish a presumption. Congress specifically defined the period before and after the tax which might be used, and the only exception provided was that, if the taxpayer was not in business during any part of this period, data of representative concerns similarly circumstanced might be used with the Commissioner's approval. The language used by Congress in Section 907 (c) is unequivocal, and provides the petitioner no leeway for contending that another and more advantageous period may be substituted for that fixed by Congress.

It is stated (Br. 47–48) that there was no other concern engaged in "a similar business and similarly circumstanced"; but that the petitioner's inability to point to representative concerns "for the purpose of improving the presumption and margin does not preclude giving consideration to

the fact that, because of that reason, the presumption and margin show a minimum amount of burden borne instead of a likely amount." But we think that the absence of representative concerns to permit taking advantage of the exception to the required base period calculation furnishes no reason for carving out of the statute another exception not stated. Nor does the fact that there was no processing during the six-month post-tax period justify an exception.

The unfairness in the particular circumstances of using the statutory base period in comparison with the tax period was urged upon the Circuit Court of Appeals for the Sixth Circuit in the case of *Colonial Milling Co.* v. *Commissioner*, 132 F. 2d 505, certiorari denied, 318 U. S. 780. The court, citing the *Anniston* case, answered that the plea was unavailing, since Congress had full power to define the period as it did. See also *Caldwell Sugars Inc.* v. *Commissioner*, 140 F. 2d 772 (C. C. A. 5th), petition for certiorari pending, No. 149. Somewhat similarly, the court below rejected an effort by the Government in the *Bain Peanut* case to use a method of cost computation in determining the margin comparisons other than that prescribed by the statute. We think the court below rightly said in this case (R. 75–76) that if, because of factors not considered in the margin computations, the inference based upon a comparison of the margins during the prescribed

periods would bear no reasonable relation to actuality, the inference would be arbitrary and the statutory presumption would be ~~overcome~~ inapplicable. No substituted presumption would, however, be established.

We do not find that either the case of *Epstein* v. *Helvering*, 120 F. 2d 427 (C. C. A. 4th), or that of *Arkwright Mills* v. *Commissioner*, 127 F. 2d 465 (C. C. A. 4th), which are relied upon here by the petitioner, lend support to its argument. The court held in the *Epstein* case that the Board of Review should not have excluded from consideration certain pertinent factors, operating within the statutory six-month post tax period, which tended to negative the presumption established by the margin evidence, which in that case was that the taxpayer had shifted the entire burden of the tax. In the *Arkwright Mills* case, the court held that the Board should have taken into account data adduced by the taxpayer for the purpose of corroborating a theory that margins in the textile industry varied proportionately to prices instead of remaining constant, even though the data included statistics with reference to prices as much as thirty months after the tax period. The evidence thus held to be relevant would not have substituted a different calculation of margins for those fixed by statute, but was designed to aid in the interpretation of the margin evidence. There is a great difference between, on the one hand, supplement-

ing by other evidence the evidence with regard to margins which the statute prescribes and, on the other hand, attempting to substitute a margin calculation covering a different period from that which the statute sets forth.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (i) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was

imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities

shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its division shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under

this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. * * *

* * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as

justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final

in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

(7 U. S. C., Sec. 648.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or

(b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for comodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*— The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data for prices paid for com-

modities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and

the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was

paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

(7 U. S. C., Sec. 649.)

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title.

(7 U. S. C., Sec. 658.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and inserting in lieu thereof "January 1, 1940".

(7 U. S. C., Sec. 645.)

APPENDIX B

S. Rep. 2156, 74th Cong., 2nd Sess., pp. 32–34 (1939–1 Cum. Bull. (Part 2) 678, 699–702)

TITLE VII. REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

GENERAL STATEMENT

Your committee recommends the adoption of this title, as an amendment to the House bill, as necessary to the protection of the revenue and to the practical administration of a large and extremely difficult class of refund cases.

This title will introduce certain necessary provisions into the internal-revenue laws relating to a particular class of refunds. The provisions of the title relate to the making of refunds of amounts which have been collected under the Agricultural Adjustment Act. It is of the utmost importance that the provisions of section 21 (d) of the Agricultural Adjustment Act, which now deals with that subject, be revised, both from an administrative standpoint and to remove certain legal objections that have been urged with respect to that section.

NECESSITY FOR TITLE VII

Title VII consists entirely of a revision of the provisions of section 21 (d) of the Agricultural Adjustment Act and related provisions. That section now provides that

no recovery or refund shall be made or allowed of any amounts paid or collected under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue that he has borne the economic burden of the tax for which refund or recovery is sought. * * *

The imperative need of revising these provisions is apparent from a consideration of the administrative burden which confronts the Bureau of Internal Revenue, if claims for refund under the Agricultural Adjustment Act must be passed on under the provisions of section 21 (d) in its present form. * * *

The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. * * *

The question as to whether processing taxes were passed on, however, involves extremely complicated economic and accounting considerations. The great bulk (approximately $850,000,000) of the moneys collected under the Agricultural Adjustment Act consisted of such taxes, but they were paid by a relatively small number of taxpayers. With respect to such claims, therefore, it is contemplated that the claimant present his claim for consideration by the Commissioner initially without any formal hearing. If the claimant is then

dissatisfied with the Commissioner's decision, he may obtain a formal hearing in the Bureau of Internal Revenue. A transcript of the record of such hearing will be prepared and will serve as a basis of review by the circuit courts of appeal and the Supreme Court.

Apart from the administrative considerations which necessitate a revision of the provisions of section 21 (d) in its present form, the contentions raised by taxpayers in over 200 suits, which are now pending in the courts, present legal considerations which make such revision equally necessary. The validity of section 21 (d) has been challenged in the courts in several respects. It has been contended that while that section states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund. It has been further argued that section 21 (d) is so vague and indefinite as not to provide a claimant with an adequate remedy at law for a recovery of the amounts illegally exacted. Section 21 (d) has also been challenged by the contention that the statute in terms seems to forbid a refund with respect to any amount, if any part of such amount has been passed on by the taxpayer. Another serious legal argument advanced relates to the fact that section 21 (d) does not provide that the Commissioner must hold a hearing with respect to a claim within a fixed period of time. Because of that fact, it has been urged that the Commissioner may defer action indefinitely until after the statute of limitations

has run, and thus deprive a claimant of his right of recourse to the courts.

The revision of the provisions of section 21 (d) contained in title VII deals with each one of these contentions and seeks to meet all the legal objections which have been raised in the courts with respect to that section. Section 907 of title VII contains provisions under which a claimant may establish a prima-facie case for securing a refund and sets forth definite factors and considerations to be taken into account in determining whether or not a claimant bore the burden of the tax for which refund was sought. Provision is made requiring the Commissioner to hold a hearing on processing-tax claims within 2 years after such hearing is sought by the claimant.

EXPLANATION OF TITLE VII

* * * * *

Section 902 adheres to the basic principle that no refunds may be made of amounts collected under the Agricultural Adjustment Act, except to the extent to which the claimant establishes to the satisfaction of the Commissioner of Internal Revenue, or to the satisfaction of the trial court, as the case may be, that he bore the economic burden of such amounts. * * *

* * * * *

Section 907 sets forth presumptions whereby a claimant may make out a prima facie case as to the extent to which he bore the burden of the tax, and show that he is entitled to a refund to that extent. The method employed is a comparison between the average margin, i. e., the spread between the tax and the cost of the basic commodity subject to the processing tax and

the receipts of articles derived from the commodity, for the period during which the claimant actually paid processing taxes, and the margin for a period combining the 24 months preceding the effective date of the tax and the 6 months after the invalidation of the Agricultural Adjustment Act from February to July 1936, inclusive.

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